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ABSTRACT

Both Protestant and Catholic residents of Ontario's school districts have historically had the right to establish separate public elementary school boards and schools, and to levy taxes to support those schools, under most conditions. Only recently have all major political parties in Ontario agreed to funding Catholic public secondary schools through grade 13, in addition to the nondenominational public secondary schools. This agreement has led to questions about the levels and types of choice that are granted to various educational constituencies and about whether granting the rights to a separate school system for Catholics violates Canada's Charter of Rights and Freedoms or preserves the expressly stated constitutional rights of the Catholics. Court tests of these matters are pending. The Ontario situation suggests several propositions about choice in education that can serve as topics for discussion: (1) choice means exclusion, (2) choice reduces public control, (3) choice implies economic direction, (4) choice implies transfer of resources, (5) increased choice for some means decreased choice for others, (6) choice is not uniform, (7) choice depends on accessible information, (8) choice awakens religious animosities, and (9) the courts must decide who has choice. (PGD)

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A CASE STUDY OF CHOICE IN EDUCATION: SEPARATE SCHOOLS IN ONTARIO*

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Often the discussion of choice in education occurs in the abstract, with both promoters and detractors arguing on the basis of preconceived notions or ideals. In this paper, a description of a particular system of education is given where a degree of choice does exist and from this description a set of propositions is derived. While these propositions may not be universally true, I believe they are accurate for the case being considered, and that they can serve as useful departures for the analysis of other systems of education, both real and proposed.

The educational system considered here is that in Ontario, Canada, which has had two types of publicly supported and governed school districts at the local level since the early 1800s. Indeed, the preservation of these two types of school districts, which were formed under laws passed while Ontario (Upper Canada) and Quebec (Lower Canada) were united under a single legislature between 1840 and 1867, was guaranteed in the Canadian constitution.[1]

The Ontario System to 1985

By the laws in effect in 1867, the residents of a given community could elect a school board of three trustees to build and operate a common school. This school board could requisition property taxes in support of the school and was also eligible for provincial grants. However, if the trustees of this common school appointed a Protestant teacher, then Roman Catholic residents had the right to elect their own school board, referred to as a separate school board, and erect their own school, hire their own Catholic teacher, direct their property taxes to that school, and collect provincial grants. Conversely, if the first board formed in a community appointed a Roman Catholic teacher, then Protestants in the area had the right to withdraw and to form their own Protestant separate school board.

Politically, it is clear that provision for separate schools in Upper Canada (Ontario), which had a large Protestant majority, would not have been made but for the mutual desire of Protestants in Lower Canada (Quebec) to receive guarantees

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for their own schools in that primarily Catholic society, and the willingness of Catholic legislators there to unite with Catholic legislators in Upper Canada to assure symmetrical rights for Catholics.

Through the years, amalgamation of school boards into larger units has brought about some changes in the relationship of the two types of school boards. All but two of Ontario's Protestant separate school boards (one enrolling about 125 pupils and one a half dozen pupils) have been merged with the non-denominational boards of education, while the Catholic school boards (both Roman Catholic separate school boards and those common school boards where Catholics were in the majority) have been merged into Roman Catholic separate school boards.

In 1871, the Province of Ontario moved to set up a system of secondary schools, and in doing so took a decision that has remained controversial to this day.[2] In effect, it defined all common schools, including that special form of the common school, the separate school, as elementary schools, and created secondary school boards to operate non-denominational secondary schools for teaching subjects in grades 9 to 13. Hence, Roman Catholic separate school boards were limited to offering instruction in grade 1 through 9, though subsequent decisions allowed them to operate "continuation schools" teaching subjects in grades 9 and 10.

Since in 1871 few children were completing grade 8, let alone grade 13, the province's decision was not immediately challenged by Catholic educators, citizens, or the Church hierarchy. But as secondary education became more common towards the turn of the century, Catholics pressed for high schools of their own, noting that, in fact, common schools had sometimes offered instruction in higher grades even before Confederation.

To resolve the question of whether the Province had acted constitutionally in providing for only non-denominational high school, in the early 1920's the Province agreed with Catholic leaders to submit a test case to the courts. The final decision was not made until June 12, 1928, when the Privy Council in England (which under the British North American Act served as the last court of appeal) ruled in Tiny Township vs, The King that the Province had, in fact, acted constitutionally; that is, the right to separate schools existed only at the elementary level.[3]

Between June 12, 1928 and June 12, 1984, the issue of extending the separate school system was rarely raised publicly. Perhaps the most notable exception was

in the 1971 election campaign, when both opposition parties, the Liberals and New Democrats, took positions favoring such an extension. They were soundly defeated by Premier William Davis' Progressive Conservatives, who argued such a move would require unnecessary duplication of services and would be social devisive. Nevertheless, significant changes were taking place. Post-war immigration had led to a significant increase in Ontario's Catholic population; Irish and French Catholics were joined by co-religionists from countries such as Italy and Portugal. As well, with increased wealth of the post war period, Roman Catholics had been able to expand their own private high school system to about 80 schools enrolling 30,000 students in grades 11 to 13. Usually, these private schools operated in the same buildings that housed publicly funded separate school grades 9 and 10. Thus, they were hybrid institutions, part private and part separate, with a given teacher being employed by both the private school (usually owned by a diocese or religious order) and the separate school board.

Extension of Funding to Roman Catholic Separate Schools

On June 12, 1984, then Premier William Davis surprised the Ontario legislature with the announcement that the government would extend funding to grades 11 through 13 to Roman Catholic separate schools over a three year period beginning in September 1985.[4] Though the government has since changed, the party that has formed the current government, the Liberal Party, has continued with this schedule and has introduced a bill for a debate in the legislature to authorize the process. This bill, designated as Bill 30, An Act to amend the Education Act, would therefore apply retroactively to legalize the steps the government has already taken by passing orders-in-council to extend financing to grade 11 this past September.

This entire process has not been without its critics. Yet, with all three provincial parties supporting the bill in principle, there has been no political forum in which the decision could be challenged. For that reason, a number of opponents of the extension of funding have sought to have the constitutionality of the proposed bill tested. In particular, they question whether the bill is constitutional under the Canadian Charter of Rights and Freedoms, which was adopted at the time the Canadian constitution was patriated in 1982 and which came into full effect in April 1985.

As well, though all parties support the bill in principle, some politicians, especially those of the Progressive Conservative party, have questioned specific sections in the bill. The question of student access, in particular, has been raised.

Constitutional Issues

The constitutional issues can be separated into two groups: those concerned with original rights and privileges under the Constitution Act, 1867 and those related to the Charter of Rights and Freedoms. The first category also has two subsidiary questions, whether the Province must extend financing, or whether it may do so under the existing provisions for separate schools or by enacting new provisions for Roman Catholic secondary schools. These may seem fine points, but they prove of crucial importance as far as the issue of student access is concerned.

While it appeared that the question of whether the Province was forced by the constitution to fund secondary grades in separate schools was answered in the Tiny Township case, some argue either that the Privy Council was in error or that new evidence is available that requires a rehearing of the case. Regardless of the argument, if the courts did find that the constitution required funding of high school grades in separate schools, then the same arrangements that now apply for grades 1 to 10 in Roman Catholic separate school boards would apply.

On the other hand, a more conservative position is that the Province may extend financing to grades 11 to 13 in separate schools. This argument is based on the regulatory powers granted by The Education Act to the Province over both separate school boards and non-denominational boards of education. That is, just as the Province can set the standards for teachers, approve textbooks and the like, so can it determine what programs are offered, as long as it does not "prejudicially" effect the rights of Roman Catholics to their own separate schools. In this case, it would seem that the same rules would apply to the secondary grades as to the elementary grades as far as matters such as student access are concerned.

An alternative to this position is the view that the province is free to create, as new entities, Roman Catholic secondary school boards (even if it required existing separate school boards to administer these schools). In this case, as distinct new creations, the schools of these new boards would be free from any constitutional restrictions that might apply to separate schools. In this case, the

Province would have a free hand in matters such as student access or selection of staff.

But what of the Charter of Rights and Freedoms? One of its key sections states,

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[5]

If the Province is granting a new right or privilege to Roman Catholics, must it not also do so to other religious groups? Indeed, this is the argument of those supporting greater choice in education in Ontario. They argue that if the Province is to fund high schools for Roman Catholics, they must do so for Jews, Anglicans, Hindus, Moslems, evangelical Christians, and so forth. Indeed, some argue that Catholics' rights to separate schools at the elementary level ought to be extended to other groups as a result of the new Charter, even though the rights of Catholics have existed since before Confederation and have therefore been seen as special rights granted to Catholics and no others. Those opposing greater choice in education use this same clause in the opposite way, suggesting that it forbids the extension of funding to Catholics and others. (Clause 29 of the Charter ensures existing rights to separate schools are not infringed by the Charter.)

While the issue of whether or not the extension of funding to Catholic secondary grades would require funding other groups is an important issue, the focus of the remainder of the paper is on the situation in Catholic secondary grades as far as student access is concerned.

Choices of Catholics and Non-Catholics

As it is proposed, Bill 30 states the following in regards to student access:

1. A person who is qualified to be a pupil in a secondary school operated by a public board is entitled to be a pupil in a secondary school operated by a Roman Catholic school board if,

a. the public secondary school is in the area of jurisdiction of the Roman Catholic school board; and

b. the director of education or, if there is no director of education, the appropriate supervisory officer of the Roman Catholic school board certifies that there is accommodation available for the person in the secondary school operated by the Roman Catholic school board.

2. A person who is qualified to be a pupil in a secondary school operated by a Roman Catholic school board is entitled to be a pupil in a secondary school operated by a public board if,

a. the Roman Catholic secondary school is in the area of jurisdiction of the public board; and

b. the director of education or, if there is no director of education, the appropriate supervisory officer of the public board certifies that there is accommodation available for the person in the secondary school operated by the public board.[6]

But what is the situation prior to Bill 30? At the elementary level, Roman Catholics who live within the jurisdiction of a Roman Catholic separate school board have the choice, on an annual basis, of whether or not they will support the separate school system with their residential (or corporate) property taxes. If they choose to be separate school supporters, their children are entitled to attend the separate school system from kindergarten to grade 10. At the same time, their children are not entitled to attend the non-denominational schools of the local board of education for kindergarten to grade 8, though they may attend grades 9 and 10 in these schools since these are considered secondary grades and all taxpayers are supporters of the non-denominational board of education at the secondary level. On the other hand, if a child's Catholic parents choose to support the non-denominational board of education, then their children are entitled to attend only the schools operated by this school board.[7]

Catholic parents may not share the benefits of both systems, by splitting their taxes between the two systems, nor may spouses in a mixed marriage do so. Finally, non-Catholics in Ontario have no choice; they must be supporters of the non-denominational board of education, except in those two areas where Protestant separate boards remain.

At the secondary level, Catholics and non-Catholics are alike in that, at present, neither have a choice: they both must be supporters of the non-denominational public system. As noted, though, Catholics who are separate school supporters may choose to send their children to either system for grades 9 and 10.

If Catholic parents do not want to send their child to a high school operated by a non-denominational board of education, they may of course send their child to a private Roman Catholic high school, where annual tuition typically ranges from $500 to $800. This has been an increasingly popular option. It is notable that, at the elementary level, there is only one private Catholic school in the province, suggesting the Catholic commuity is satisfied with the schooling offered by separate school boards.

In this description of current choices, the term "entitled to attend" deserves emphasis, since in fact greater choice is commonly available. First, many school boards, both Roman Catholic separate school boards and non-denominational boards of education, will accept children of supporters of another board if either the board or the parents are willing to pay fees. These fees are regulated by the province and are typically about $50 per month, though they may be higher in the case of special programs. Non-denominational boards of education are more likely than Catholic separate school boards (which are concerned about maintaining their Catholic character) to follow such a policy, in part no doubt to their having been hard hit by declining enrolments, but largely because they support a policy of non-discrimination. Indeed, some non-denominational boards of education follow the practice of waiving all fees. Although such open door policies thus increase the choices available on a de facto basis, the result is haphazard; a child in one area might have an option that does not exist for a child living elsewhere.

How, then, would Bill 30, as it currently stands, affect the choices of Catholics and non-Catholic students, and how might different decisions in regards to the constitutional questions affect the implementation of this act?

Under Bill 30, Catholic parents would find at the secondary level a situation somewhat different than they now have at the elementary level. First, once they select which of the two systems to support, their children would only be entitled to attend one system from kindergarten to grade 13, though from grades 9 to 13 their child might attend the other system, space being available. Thus, the complete choice as to which system to attend at grades 9 and 10 would be lost, while the right to attend the other system at the secondary level would depend on the local situation as to space as interpreted by the board which they do not support with their taxes. Thus, the extent of choice would vary from area to area, and could hardly be considered an entitlement or right; at the same time, if their child was accepted by a non-denominational board, the school board which they support with their taxes would be bound to pay any fees.

Of more concern to Catholics might be the situation in some Catholic separate high schools, where non-Catholics would now be eligible to attend, space being available. Though again hardly a clear-cut right, there is no limit set in Bill 30 on the number of non-Catholics that might be admitted; potentially, the Catholic character of the school might be diluted, though it is probable any non-Catholics in the school by choice would be required to participate in religious instruction and exercises.

For non-Catholics, somewhat greater choice than currently exists, it appears, would be available. First, a non-Catholic youth could, as at present, attend the non-denominational high schools operated by the board of education. Second, the youth could apply to attend a high school operated by a Roman Catholic school board and, if the board found space to be available, be admitted. Yet, while this latter option would appear to extend choices, it has been suggested that in smaller communities, where Catholic high schools may be available for the first time, the number of program options will decline in the non-denominational high school; thus, there may be a de facto loss of choice affecting all students in the community.

Perhaps speaking to this latter situation, the proposed law recognizes a special class of youth, namely, those for whom a given program is reasonably available only in a high school which their parents do not support with their taxes. For these pupils, access to the school is guaranteed; if it is a Roman Catholic high school, and such a child is not, then the child would be eligible to withdraw from religious instruction and exercises. Perhaps widespread use of this option in smaller communities would ensure the preservation of low enrolment programs.

While the preceding picture is based on the proposals in Bill 30, one must question whether it is one which will be possible after the courts have decided on constitutional issues. The three cases outlined earlier will now be considered.

In the first instance, where the courts find that separate schools have a right to offer secondary education, then it seems Bill 30 is far too liberal. That is, by providing access to non-Catholic students when space is available, the bill reduces the control of separate school board over who they admit. It may be that such a law is one which "prejudicially" affects the rights of Catholics to their separate school system, and therefore is not constitutional.

In the second case, wherein the courts are seen to decide that the province may use its regulatory powers to extend the separate school system, we must come to a similar conclusion. That is, though the Province is not forced to extend the Roman Catholic separate system, in choosing to do so it is still bound by the constitutional limitations placed on it by the Constitution Act, 1867. It may not, then, in any way weaken Catholic control over matters touching the denominational character of the system, even when it is the operation of a new program that is at issue.

Thus, only in the final case, in which the courts hold that the Province is, in fact, creating a new institutional framework for Catholic high schools would it seem the Province could impose the admission regulations, however weak they are, concerning non-Catholics. And if this is the case, then clearly the Province could go further, and provide non-Catholics the right to attend Catholic high schools; indeed, application of the Charter of Rights might force them to do so. Alternatively, the Province might instead restrict admission to Roman Catholic high schools to Catholics alone, as is the case at the elementary level, though it is suggested this might conflict with the Charter.

At this point, one can only guess as to the ultimate resolution of these matters. It is at very least ironic that laws that provided a right or privilege to a Roman Catholic minority in an overwhelmingly Protestant Ontario in an era when Protestantism dictated much of public policy are now seen as providing special privileges that must be extended to all other minorities--including minority Protestant sects--or be restricted to their most limited application so as not to threaten social cohesion.

Propositions About Choice in Education

The Ontario situation suggests a number of hypotheses or propositions about choice in education. The nine following dicta are set for the guidance and debate of others.

Proposition One: Choice means exclusion.

For a choice to exist, there must be variety. Variety in schools cannot exist without control over input, process and output. In the case of religious schooling, control of admission of students (as well as selection of staff) is clearly necessary in cases where a religious group is serving the educational needs of its own members. In Ontario, Roman Catholic separate school boards have not in fact served all Roman Catholic youth, in part because they could not offer a complete educational program. The arrival of funding of Catholic secondary schools therefore provides them an opportunity to educate more Catholic children, and they are reluctant to consider serving others until the needs of their own community are fully satisfied.

Proposition Two: Choice removes some matters from public control.

Particularly in the case of religious schools, both governments and the courts will be reluctant to enter into disputes that involve religious doctrine; yet, religious doctrine may define matters of curriculum (e.g., creation science and sex education), qualifications for admission (only the children of practising adherents to a religion may be admitted), and qualifications for employment (e.g., "denominational cause" may be grounds for dismissing an employee). Thus, the powers of government and the courts over the kind of education offered may be decreased, while those of religious bodies are increased.

Proposition Three: Choice implies economic direction.

Given the loss of regulatory and judicial powers government experiences over education when greater choice is provided, one can expect government to express its will more by way of economic direction, i.e., funding programs it believes are in the public interest on a categorical or program basis. For example, by deciding to provide grants to Roman Catholic school boards for non-Catholics who are enrolled and by proposing in Bill 30 that school boards be required to pay the fees for

secondary students enrolled in another school board, the Province is promoting open enrolment policies; conversely, by denying grants and disallowing the payment of fees by school boards it could discourge such a policy.

Proposition Four: Choice implies the transfer of resources.

With choice supported by public funds, resources will tend to follow the student. Provincial grants, property taxes, staff and facilities will be transferred from one school system to another as enrolments shift. To prevent capricious changes, regulations allowing, choice on an annual basis as to which school system to support are enacted.

Proposition Five: Increased choice for some means decreased choice for others.

It is clear that as greater choice is provided, schools will themselves become more homogeneous. Thus, those parents preferring that their children be educated in a socially heterogeneous setting will find that that option will become less available.

Proposition Six: Choice is not uniform.

That is, individuals associated with one group will have greater choice than individuals in another group. In Ontario, Roman Catholics have two choices for the education of their children, as do the parents in a mixed marriage; Protestants, Jews and others have only one choice. (In several other provinces, however, where regulations differ, Jews may choose either system since they are neither Catholic nor Protestant.)

Proposition Seven: Choice depends on accessible information.

Already, disputes concerning the provision of information to Catholic youth in separate schools by non-denominational boards of education have arisen. Not surprisingly, some Catholic educators, supporting their Church's position that Catholic youth should be educated in Catholic schools, no longer feel obliged to welcome staff from non-denominational high schools who, in past years, have freely distributed information about program opportunities in their schools.[8]

Proposition Eight: Choice awakens religious animosities.

While the Ontario experience provides ample evidence to support this proposition, an example from Alberta will be used to illustrate this phenomena. There, provincial law allows private schools to associate with separate or non-denominational school boards. In Calgary, an evangelical Christian school applied for such status with the Calgary Board of Education. However, once established, the school proved a matter of controversy, as it drew students from other areas and promoted a fundamentalist view of Christianity. A slate of school board candidates ran on a platform of ending all such arrangements; they won, and terminated agreements with both the Logos Christian school and a Jewish school, which had a long standing arrangement with the board. Today, both the evangelical Christian school and the Jewish school are associates of the Calgary Roman Catholic separate school board.[9]

Proposition Nine: The courts will decide who has choice.

Choice creates opportunities for disputes that do not exist when choice does not exist. These disputes can rearely be solved to everyone's satisfaction through legislation; thus it will be the courts that decide how choice will be allocated.

These nine propositions, based on my assessment of Ontario's experience, suggest that providing choice in public education is not easy and may, in the end, result in diversity without choice. Clearly, whether such a situation is better than a public school monopoly is a matter for each person to decide. Nevertheless, that the quest for greater choice may result in such a contradictory conclusion is a matter that itself deserves careful consideration.

NOTES

1. From 1867 to 1982, the British North American Act, 1867, (BNA Act) an act of the British Parliament, served as the Canadian constitution. During this period, the final court of appeal concerning constitutional disputes was the Privy Council in England and all amendments had to be approved by the British Parliament. In 1982, by action of the British parliament on recommendations from the Canadian parliament, the act was patriated to Canadian and renamed the Constitution Act, 1867. It can now be amended only in Canada and the Supreme Court of Canada is now the final court of appeal on constitutional matters. The accompanying Constitution Act, 1982 included the Canadian Charter of Rights and Freedoms, which came into full effect in April 1985.

   The key section of the BNA Act regarding education was Secion 93, which granted exclusive jurisdiction in the field of education to the provinces, with the exception that "nothing in any law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have be law in the Province at Union." Further, religious minorities with separate schools were granted the right of appeal to the Federal government against "any Act or decision of any Provincial Authority affecting any Right or Privilege" that they possessed in law at the Union, and the Parliament of Canada was granted the authority to make remedial laws as circumstances required.

2. C. B. Sissons, Church and State in Canadian Education, Toronto: The Ryerson Press, 1959; pp. 96-112.

3. Op. cit., p. 100. See also, Roman Catholic Separate School Trustees for Tiny vs. The King (1928) A.C. 363.

4. William G. Davis, "Elementary and Secondary Funding in ONtario". A Statement in The Legislature, June 12, 1984. Printed pamphlet provided by The Ontario Ministry of Education, n.d.

5. Canadian Charter of Rights and Freedoms, S. 15 (1).

6. An Act to amend The Education Act, (Ontario). s. 1360.

7. Education Act, R.S.O., 1980 C. 129 S. 32 (4).

8. The Ontario Association of Education Administrative Officials, "Brief on Access to Information Essential for Informed Student Choice of Secondary School Education Alternatives: Strategies and Guidelines." Toronto: OAEAO, August 1985; Mimeographed.

   The OAEAO brief is couched in more diplomatic terms, referring to "The possibility for misunderstanding," and concerns that "elementary students in the separate board . . . might not be able to find out about special opportunities in the public school not necessarily available in the separate

system." (p. 1). It suggests a number of approaches to provide access to information, including, "Advertising in the traditional media, avoiding abuses" (p. 6).

9. Barry Nelson, "Religion-laced Teaching in Schools Is Raising Hackles," Toronto Globe and Mail, February 20, 1982.